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408595—41

# In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 317

LINUS C. COGGAN, PETITIONER

*v.*

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 9–14) is not officially reported. The opinion of the Circuit Court of Appeals (R. 35–42) is reported at 119 F. (2d) 504.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 2, 1941 (R. 42). The petition for a writ of certiorari was filed July 28, 1941. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTION PRESENTED

Whether the loss sustained by the taxpayer upon the final extinguishment of his interest in certain realty by a decree which followed a tax sale and foreclosed all rights of redemption is a capital loss under Section 117 of the Revenue Act of 1934, deductible only to the extent limited by the statute, or is an ordinary loss, deductible in full, under Section 23 (e) of the Act.

### STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra,* pp. 8–12.

### STATEMENT

The facts, as stipulated (R. 26–30) and as found by the Board (R. 10–13), may, in so far as material to the issue presented here,[1] be stated as follows:

In 1927 the taxpayer advanced $10,000 to one George H. Bruce, who also owed the taxpayer $5,000 for legal services. The taxpayer received as security for the payment of the $15,000, a mortgage on

[1] In addition to the question involving the treatment of the loss as to the real property presented in the petition for certiorari, the case below also involved an issue concerning the treatment of a loss on certain shares of stock, likewise decided against the taxpayer (R. 39–41), and a dispute as to the amount of the taxpayer's basis for the realty, which was not decided, since the decision as to the limited deductibility of both losses rendered that dispute immaterial (R. 41–42).

certain real estate in Boston. The mortgage was executed by Eva M. Cann who was the owner of record of the property as a straw for Bruce. The debt secured by the mortgage was evidenced by a note for $15,000 on which Miss Cann appeared as maker. Bruce did not endorse the note. Miss Cann was a person of no financial responsibility. The taxpayer, who was on a cash basis, never reported as income the $5,000 charged for legal services (R. 10–11).

Later in 1927, Miss Cann conveyed the property to Mary A. Gallant subject to the mortgage. In 1928, Mary A. Gallant conveyed the property to Mary E. Coutere, also subject to the mortgage (R. 11).

On March 24, 1930, because of a default in payment on the note and failure to pay taxes on the property, the taxpayer, acting under a statutory power of sale contained in the mortgage, foreclosed the mortgage by selling the property at public auction. The successful bidder was the mortgagor, Miss Cann, again acting as straw for Bruce. Although the bid price was nominally $7,500 no money actually changed hands. The deed executed pursuant to the sale conveyed the property to Miss Cann subject only to unpaid taxes. At the same time, by prearrangement, Miss Cann gave the taxpayer a new mortgage for $15,000. All the instruments were recorded on April 21, 1930. No payments of principal had been made on the mortgage prior to the foreclosure (R. 11).

Local real estate taxes assessed on April 1, 1929, being in arrears, there was a tax sale by the City of Boston on August 26, 1930, in accordance with Massachusetts General Laws, c. 60, and the city became the purchaser at the sale (R. 11). Under the Massachusetts law, the bid price at a tax sale is of necessity the amount of unpaid taxes and interest (§ 43). The owner remains in possession, with a statutory right of redemption which persists until final foreclosure proceedings which cannot be instituted until a lapse of two years. Massachusetts General Laws, c. 60, §§ 62, 65.

In 1932, Miss Cann conveyed her equity of redemption "subject to all unpaid taxes, outstanding tax titles * * * and assessments if any there are" to Norine C. Murphy, a straw for the taxpayer. The conveyance was made in lieu of foreclosure by the taxpayer, and as part of the arrangement, it was understood that the taxpayer would make no further claim against Miss Cann or Bruce personally on account of the mortgage debt (R. 11–12).

On September 13, 1935, in accordance with the provisions of Massachusetts General Laws, c. 60, § 65, the City of Boston filed a petition in the Land Court to foreclose all rights of redemption remaining after the tax sale of August 26, 1930. A final decree was entered in the Land Court on December 14, 1935, forever foreclosing all rights to redeem by the owner of the equity, the mortgagee or creditors (R. 12).

In his income tax return for 1935, the taxpayer claimed a deduction of $8,983.37 as a loss on the

real estate, computed upon a cost of $10,000, less depreciation of $1,016.63. The Commissioner, after adjusting the basis to $7,500, determined that the loss was a capital loss deductible only subject to the limitations of Section 117 of the Revenue Act of 1934 (R. 6–8, 12–13).

The Board of Tax Appeals held that the loss was an ordinary loss deductible in full (R. 13–14). The court below reversed the Board (R. 35–42).

## ARGUMENT

The court below correctly held that the loss sustained by the taxpayer upon the final extinguishment of his interest in the realty by the decree of foreclosure which followed the "tax sale" for nonpayment of local taxes is a capital loss deductible only subject to the restrictions imposed by Section 117 of the Revenue Act of 1934, 48 Stat. 680.

In *Helvering* v. *Hammel,* 311 U. S. 504, and *Electro-Chemical Co.* v. *Commissioner,* 311 U. S. 513, this Court decided that the statutory provisions limiting the deductions of losses from "sales or exchanges of capital assets" were applicable to a loss suffered by reason of a mortgage foreclosure, notwithstanding the "involuntary" nature of the transaction. While the court below observed in passing (R. 41) that, as "a fresh question," it might have had "difficulty" in holding that the extinguishment of the taxpayer's interest by the foreclosure decree after the tax sale was a "sale or exchange" within the meaning of the statute, it

properly recognized (R. 41) that all doubt had been removed and that this result was required by the decision in *Helvering* v. *Nebraska Bridge Supply & Lumber Co.*, decided by this Court on March 31, 1941, No. 776, October term, 1940, reversing the Circuit Court of Appeals for the Eighth Circuit (115 F. (2d) 288), upon the authority of the *Hammel* and *Electro-Chemical* cases. Under the principles enunciated by this Court, the taxpayer's loss would be a capital loss even though he were not personally liable for the local taxes,[2] as he asserts (Pet. 2), since consideration moving to the taxpayer in the "sale" is not necessary. See *Welch* v. *Street*, 116 F. (2d), 953 (C. C. C. 1); cf. *Helvering* v. *Nebraska Bridge Supply & Lumber Co.*, 115 F. (2d) 288 (C. C. A. 8).

There is no reason for any different treatment of the taxpayer's loss, as suggested (Pet. 4), merely because here the sale preceded—while in the *Ham-*

[2] Although the property was held of record in the name of a straw, the taxpayer was the real owner—otherwise there would be no basis for his claim to any deduction—and as such was personally liable for the real-estate taxes. Under Massachusetts law, a mortgagor and mortgagee are joint owners for purposes of taxation (General Laws of Massachusetts, c. 59, Section 14), and while the mortgagee is liable for the tax only in proportion to his interest (*id.*, Sections 12 and 13), the taxpayer, being both the mortgagee and the real owner, was liable for the entire tax, which constitutes a lien on the real estate (*id.*, c. 60, Section 37), and which the collector may levy and collect by distress or seizure and sale (*id.*, Sections 24 and 25), or by imprisonment (*id.*, Section 29), or by suit (*id.*, Section 35), or by sale or taking of the property (*id.*, Sections 37 and 43).

*mel* case the sale followed—the decree of foreclosure, which under the circumstances rendered final the taxpayer's loss from the "sale" and thus furnished "the definitive event establishing the loss within the meaning and for the purpose of the revenue laws." *Helvering* v. *Hammel,* 311 U. S. at 512. There is clearly no conflict, as urged (Pet. 4), with the *Hammel* case, nor is the instant case distinguishable, as asserted (Pet. 4–5), from the *Nebraska Bridge* case. The way in which the taxpayer's loss from the prior tax sale acquired finality in this case under the law of Massachusetts (General Laws, c. 60, Sections 62 and 65, *infra*), is not different in substance from the method by which the loss from the prior sale involved in the *Nebraska Bridge* case became final.

## CONCLUSION

The decision below correctly follows the controlling decisions of this Court. There is no conflict of decisions, and no question calling for any further review by this Court. The petition should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
*Acting Solicitor General.*
SAMUEL O. CLARK, JR.,
*Assistant Attorney General.*
HELEN R. CARLOSS,
HARRY MARSELLI,
*Special Assistants to the Attorney General.*

AUGUST 1941.